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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 216

TRADERS OIL COMPANY OF HOUSTON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 25) is reported at 263 F. 2d 835. The Board's Decision and Order (R. 132–152)[1] are reported at 119 NLRB 746.

JURISDICTION

The decision of the court below was entered on February 13, 1959, and a petition for rehearing was denied April 22, 1959. The petition for a writ of certiorari

[1] "R" references are to portions of the Transcript of Record printed pursuant to the rules of the court below as Volume I. "P.A." references are to portions of the testimony and exhibits printed as an appendix to the Board's brief below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

was filed on July 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the Board's finding that petitioner refused to bargain collectively with the Union, chosen by a majority of its employees, in violation of Section 8(a) (5) and (1) of the National Labor Relations Act.

2. Whether the Board's remedial order directing petitioner to bargain collectively with the Union is proper and valid.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 21–22 of the Petition.

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

On April 6, 1956, a group of petitioner's employees working at its Humble Field drilling lease met with L. Tom Fox, secretary-treasurer of the Union [2] (R. 79, 133; P.A. 11, 15–20, 73–75, 141, 167). At this meeting, all 13 non-supervisory employees present, who constituted a majority of the production and maintenance employees at the Humble Field lease, signed application cards for union membership and authorized the Union to bargain for them with petitioner

[2] Local 4–227, Oil, Chemical and Atomic Workers International Union, AFL–CIO.

(R. 79, 133; P.A. 15–20, 142–152, 154). Later that day, employee R. E. Pearson, Jr., told his father, Field Superintendent Pearson, "We all had joined the Union." Whereupon Superintendent Pearson replied, "Well, looks like you all bumped yourselves out of a job" (R. 86–87, 133; P.A. 11, 92–93).

Around April 10, another employee signed a union application and authorization card, thus further increasing the Union's majority among the non-supervisory employees at the Humble Field lease for purposes of collective bargaining (R. 75, n. 4, 79, n. 7, 80, n. 8, 94, 133, 134; P.A. 16–17, 19, 71, 142–152, 154–155, 167).

On April 13, Union Secretary Fox informed petitioner's vice-president, S. D. Lambdin, that the Union represented a majority of petitioner's employees at the Humble Field lease, that it wished to bargain collectively, and that the Union was willing to prove its majority through an impartial third party. Lambdin replied that he would have to consult his lawyer, and would contact Fox later (R. 79, 93–94, 134; P.A. 8, 21–23, 39–40).

The next working day, Monday, April 16, petitioner, for reasons unrelated to this proceeding, laid off eight of the non-supervisory employees who had designated the Union (R. 80, 135; P.A. 28–29, 78–79). This still left the Union with a majority in the unit requested (R. 135; P.A. 142–144, 149, 155, 167). Later the same day, when employee Wilbur M. Borders protested the layoffs to Superintendent Pearson, the latter, in the presence of five of the other laid-off employees, replied, "Well, who started this mess [re-

ferring to the Union] anyway?" When Borders admitted that he had, Pearson stated "he would see that [Borders] never worked for Traders Oil Company as long as he was superintendent out there" (R. 86, 135; P.A. 84–91).

On April 25, at a meeting between representatives of the Union and petitioner, Union Secretary Fox again requested petitioner's Vice-President Lambdin to bargain on the terms of a contract (R. 79–80, 135; P.A. 24–26, 39). When Lambdin asked Fox to let him see the proposed contract, Fox indicated to Lambdin that it would not be feasible to do so until petitioner agreed to recognize and bargain with the Union (R. 135–136; P.A. 44). Lambdin then questioned the Union's majority status, and Fox offered to prove its majority either through a check of the Union's cards by an impartial third party or a Board election (R. 79–80, 135–136; P.A. 26, 28). A consent election agreement was later signed on May 7, and the election scheduled for May 15 (R. 80, 136; P.A. 44–45, 170–174).

Meanwhile, among the non-supervisory employees who were still employed by petitioner, on May 1 the Union obtained newly-executed cards from five of the employees who had previously designated the Union to represent them (R. 80; P.A. 20, 29–34, 47, 156, 158–161). Added to the card of another employee who had previously executed such a designation, this gave the Union authorization cards from six of the seven employees in the unit (P.A. 137–138, 149, 167).

Shortly before the scheduled election, Vice-President Lambdin told a meeting of the employees that,

whatever their "gripes" and grievances were, he wanted to "straighten it out with them," and later added "that whatever he told the men he would do he was willing to put it in writing" (R. 81, 96–97, 136; P.A. 48–49, 58–60, 115–116, 122–125, 132–133). On May 14, the evening before the election, some of the employees met at the home of a supervisor where they drew up a contract in pencil to present to Lambdin, which all present signed (R. 81–82, 136–137; P.A. 50–51, 53, 55–56, 61, 65–66, 72–73, 95–96, 113–116).

The next morning, May 15, the day of the election, the contract that had been drawn up was presented by the employees to Lambdin who had it typed on petitioner's letterhead (R. 81, 84, 136–137; P.A. 53–56, 119–121, 162–165, 168–169). Later in the morning, but before the election, Lambdin signed the contract on behalf of petitioner and obtained the signatures of two employees who signed individually for themselves (R. 81, 137; P.A. 54–56, 62–66, 129–132). The election was subsequently held at 12:00 noon, the Union losing 9 to 0 (R. 80–81; P.A. 36–37, 58). After the election, Lambdin obtained the signatures of other employees on the contract and each employee was given a copy of the document which contained provisions for wages, sick leave, vacations, holidays and other terms and conditions of employment, but no clause recognizing any union (R. 82, 135, 137; P.A. 56, 95–96, 168–169).

Not until after the election did the Union learn that the employees had entered into this contract with petitioner (R. 85, 137; P.A. 37). Timely objections to conduct affecting the result of the election were filed

by the Union. These were sustained by the Regional Director, but later pursuant to the Union's request, the Board dismissed the representation petition in order to process the unfair labor practice charge based on petitioner's conduct (R. 85, n. 11, 137, n. 8, 48–54; P.A. 6–7).

On the basis of the foregoing, the Board found that petitioner violated Section 8(a)(1) of the Act by Superintendent Pearson's statements to employees R. E. Pearson, Jr. and Wilbur M. Borders, on April 6 and 16 respectively, threatening them with reprisal for engaging in union activities (R. 133, 135). The Board found that petitioner's offer through Vice-President Lambdin to straighten their grievances out and to "put it in writing," as well as his action on the morning of the election in signing a contract with individual employees, constituted "a promise and a grant of economic benefits in return for the employees' renunciation of the Union at the polls," in further violation of Section 8(a)(1) of the Act (R. 136–137). The Board also found that petitioner refused to recognize and bargain with the Union upon its requests on April 13 and 25 in violation of Section 8(a)(5) of the Act (R. 137–140).

B. THE BOARD'S ORDER

The Board's order requires petitioner to cease and desist from the unfair labor practices found, from interfering in any manner with the exercise of rights guaranteed employees under Section 7 of the Act, and from giving effect to the aforesaid contract of employment with individual employees (R. 140–141).

The order further requires petitioner to bargain with the Union upon request, to post appropriate notices, and to give separate written notice to each of the employees who signed the individual contract of employment that such contract will not be enforced, but without prejudice to the assertion of any legal rights acquired thereunder (R. 141–142).

C. THE DECISION OF THE COURT OF APPEALS

The court below, in a *per curiam* opinion, upheld the Board's decision as adequately supported by the record and enforced its order in full (Pet. 25).

ARGUMENT

1. An employer, prompted by a good faith doubt of the majority status of a union demanding recognition as the bargaining representative of his employees, may decline to bargain with it and insist that the union first establish its status in a Board election even though in fact it may have such status. However, where pending the election the employer engages in unfair labor practices to undermine the union, the Board may, as in the instant case, draw the inference that the prior refusal to recognize or bargain with the union was in fact prompted not by a good faith doubt of its majority status but by a desire to destroy its representative status, and hence was violative of the Act. E.g., *Joy Silk Mills, Inc.* v. *National Labor Relations Board,* 185 F. 2d 732, 741 (C.A.D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Pyne Molding Corp.,* 226 F. 2d 818, 821 (C.A. 2); *National Labor Relations Board* v. *Stewart,* 207 F. 2d 8, 13 (C.A. 5).

Petitioner does not, apparently, challenge the foregoing principles. Its chief complaint is that (Pet. 9–13) there is no evidentiary basis in the record for finding that it ever refused to bargain with the Union, and hence there was no occasion for the Board to look to the other unfair labor practices bearing upon petitioner's good faith or lack of it. The issue thus narrows down to whether or not the Board's finding that petitioner did in fact refuse to bargain with the Union upon the latter's request is supported by substantial evidence on the record as a whole. The resolution of that issue adversely to petitioner plainly presents no question warranting further review by this Court. In any event, the record adequately supports the Board's findings in this respect. As the Board found (R. 139), when the Union requested petitioner to bargain with it, petitioner countered with a demand that the Union first disclose its bargaining demands and at the same time reserved to itself the right to question the Union's representative status after such disclosure had been made (*supra*, p. 4). Viewed in the light of petitioner's hostile attitude towards the Union, the Board could properly conclude, as it did, that petitioner's equivocal response was intended to be a rejection of the Union's demand for recognition and bargaining.

Alternatively, petitioner asserts (Pet. 12–13) that, if it engaged in any unlawful conduct prior to the election, the Union waived it when it consented to the election, and hence it could not be heard to complain that petitioner's misconduct brought about the Un-

ion's defeat at the election. But here, unlike the situation in *Aiello Dairy Farms*, 110 NLRB 1365, cited by petitioner, it was not until after the election that the Union first heard of the contracts which petitioner had entered into with the individual employees which conclusively revealed petitioner's bad faith in dealing with the Union. In such circumstances, there is no basis for invoking any doctrine of waiver. Cf. *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482; *National Labor Relations Board* v. *T. W. Phillips Gas & Oil Co.*, 141 F. 2d 304, 305–306 (C.A. 3); *Warehousemen's Union, Local 117, Teamsters* v. *National Labor Relations Board*, 121 F. 2d 84, 92–94 (C.A. D.C.), certiorari denied, 314 U.S. 674.[3]

2. Petitioner also asserts (Pet. 14–18) that the Board's order requiring it to bargain with the Union is improper because, first, it fails to give consideration to the employees' present wishes as to their choice of bargaining representative and, secondly, it is too indefinite since it fails to specify the period of time during which petitioner is obligated to bargain with the Union. The short answer to these contentions is that this Court has repeatedly upheld the

[3] Petitioner also suggests (Pet. 13) that the Board's findings that it engaged in acts of interference and restraint violative of Section 8(a)(1), on the basis of which the Board inferred petitioner's bad faith in refusing to bargain with the Union, either lack support in the record, or rest on privileged speech. As summarized above, *supra*, pp. 3–5, petitioner threatened employees with loss of employment for joining the Union and promised to take care of their "gripes" if they repudiated it at the election. Such threats of reprisal and promise of benefits constitute obvious violations of the Act.

Board's power to prescribe such remedial action in cases of this type. *Medo Photo Supply Corp.* v. *National Labor Relations Board*, 321 U.S. 678, 687; *Franks Bros. Co.* v. *National Labor Relations Board*, 321 U.S. 702, 705; *National Labor Relations Board* v. *Warren Co.*, 350 U.S. 107, 112. As the cases make clear, petitioner is required to bargain with the Union in good faith for a reasonable period of time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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